92-671

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1992

DWIGHT H. OWEN

Petitioner

v.

HELEN OWEN

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Supreme Court decision in Farrey v Sanderfoot, ___ US ___, 111 S Ct 1825, 114 L Ed 2d 337 (1991), which denied lien avoidance under 11 USC 522(f) as to lien created by a state divorce judgment in order to protect a pre-existing ownership interest of a non-debtor spouse in specific property (and hence protect the distribution under the decree) controls the decision in Owen where, in Owen, no joint or pre-existing ownership interest in specific property was ever shared by the debtor and creditor, and where the lien was not created by the specific terms of any judgment and where avoidance of the lien would, in no way, result in a deprivation of any ownership interest of the creditor or otherwise defeat any property distribution in favor

of that creditor under such judgment.

2. Whether the Court of Appeals, in Owen, misapplied Farrey when it concluded that there was no "fixing of a lien on an interest of the debtor...as the debtor had no property interest prior to the fixing of the lien" where, in Owen, the debtor's ownership of property is an indispensable prerequisite to the acquisition of any lien by his creditor under Florida law.

3. Whether the apparent rule of Farrey should be limited or narrowed to the extent that it not be applied to the broader category of general judgment liens, such as the one involved in Owen, which arise by random operation of law, and where no ownership-to-lienholder continuum exists in the creditor and where avoidance of such lien will not result in any deprivation of any pre-existing ownership interest held by the creditor in the property.

STATEMENT PURSUANT TO RULE 14.1(b)

Dwight H. Owen is an individual Petitioner

Helen Owen is an individual Respondent

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OPINIONS BELOW

The 14 May 1992 decision of the United States Court of Appeals for the Eleventh Circuit is reported at 961 F 2d 170 and is reprinted in the Appendix to this petition at (A1). That decision was rendered upon remand from the United States Supreme Court following the decision in Owen v Owen, ___ US ____, 111 S Ct 1833, 114 L Ed 2d 350 (1991). See reprint of that decision at (A 12). The prior decision of the United States Court of Appeals is reported at 877 F 2d 44 and is reprinted at (A 49). The decision of the United States District Court, Middle District of Florida, is reported at 86 BR 691 and is reprinted at (A 62). The decision of the United States Bankruptcy Court, Middle District of Florida was not reported but is reprinted at (A 73).

In addition to the foregoing opinions, the opinion of the United States Supreme Court in Farrey v Sanderfoot, ___ US ___, 111 S Ct 1825, 114 L Ed 2d 337 (1991) published the same day as the decision in Owen v Owen, above, is also reprinted at (A 77).

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered, after remand from the United States Supreme Court, on the 14th day of May 1992. (A1). That decision affirmed the prior decision of the United States District Court, Middle District of Florida, which had been entered on the 7th day of June 1988. (A62). Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc, pursuant to 11th Circuit Rule 35-2. These were denied by the Court of Appeals on the 21st day of July 1992. (A106).

This Court has jurisdiction pursuant to 28 USC 1254(1).

STATUTES INVOLVED

Title 11, United States Code, Section 522(b) and Section 522(f) are reprinted at (A 110).

Section 222.20, Florida Statutes is reprinted at (A 113).

Section 55.10, Florida statutes is reprinted at (A113).

CONSTITUTIONAL PROVISIONS INVOLVED

Article X, Section 4, Florida Constitution is reprinted at (A114).

Article XI, Section 5, Florida Constitution is reprinted at (A 116).

STATEMENT OF THE CASE

I. INTRODUCTION

This case was previously before this Court. Owen v Owen, ___ US ___, 111 S Ct 1833, 114 L Ed 2d 350 (1991). (A 12). The foregoing decision reversed the prior decision of the United States Court of Appeals for the Eleventh Circuit, 877 F 2d 44, (A 49), and remanded the case for consideration in light of this Court's decision in Farrey v Sanderfoot, ___ US ___, 111 S Ct 1825, 114 L Ed 2d 337 (1991). (A 77). Following consideration on remand, the Court of Appeals again affirmed the decision of the United States District Court, Middle District of Florida. (A 1), The District Court had affirmed the decision of the United States Bankruptcy Court, Middle District of Florida, which had denied Petitioner's Motion to Avoid Res-

pondent's judgment lien, pursuant to 11 USC 522(f)(1), upon Petitioner's homestead.

The decision of the Court of Appeals on remand construed and applied this Court's holding in Farrey v Sanderfoot, above. The Court of Appeals concluded that the holding in Farrey applied in Owen and that the Petitioner could not avoid Respondent's lien because Petitioner did not own the property interest to which the lien attached "at some point before" the lien attached to that interest. See 961 F 2d at 172. (A5-6). The issue determined by the Court of Appeals was one which this Court specifically left undecided in the Owen opinion. See 111 S Ct at 1836 and 1838. (A 19)(A 29-30). At 111 S Ct 1836, the opinion states

> "The lien in the present case is a judicial lien, and we assume without deciding that it fixed 'on an interest of the debtor in property.'"

At 111 S Ct 1838, the Court states

> "It could be argued that the lien did not fix 'on an interest of the debtor' (cite)...We express no opinion on these points..."

The Court of Appeals concluded that there was no fixing of a lien on Petitioner's interest in the property. 961 F 2d 172. (A 4).

II. THE FACTS

The facts are not disputed. The Respondent obtained a money judgment against the Petitioner in Circuit Court, Manatee County, Florida in Decembe 1975. A certified copy of that judgment was recorded in the public records of Sarasota County, Florida on 29 July 1976. At that time Petitioner owned no property in Sarasota County.

On 27 November 1984, Petitioner acquired record fee ownership of the real property at issue herein, Unit 304 of Embassy

House, a condominium, located in Sarasota County. At that time, Petitioner was a single man and not "the head of a family" as was then required for entitlement to the Florida constitutional homestead exemption. Article X, Section 4, Fla. Const. (A 114).

On 6 November 1984, the citizens of Florida approved an amendment to the constitutional homestead provision which substituted "a natural person" for the previous "head of a family" requirement. That amendment became effective on 8 January 1985. Article XI, Section 5, Fla. Const. (A 116).

Under Florida law, no judgment is a lien upon any property until property is owned by the judgment debtor. First National Bank of Chipley v Peel, 145 So 177 (Fla 1933); Bowers v Mozingo, 399 So 492 (Fla 3d DCA 1981). A duly recorded

judgment against a debtor becomes a lien upon that debtor's real property at the time the debtor acquires ownership of real property in the county in which that judgment is recorded. B. A. Lott, Inc. v Padgett, 14 So 2d 667 (Fla 1943). Thus, the Respondent's judgment attached as a lien at the time the above property was acquired by petitioner on 27 November 1984. In addition, a judgment which attaches as a lien upon the debtor's property at a time when the debtor is not eligible to claim the homestead exemption will remain enforceable despite the fact that the debtor later qualifies for the exemption. Aetna Insurance Company v LaGasse, 223 So 2d 727 (Fla 1969). Although the attachment of such a lien does not prevent subsequent acquisition of the homestead right, see Lamb v Ralston Purina Company, 21 So 2d 127 (Fla 1945), such a lien will remain enforceable

even as to homestead property. See Porter-Mallard Company v Dugger, 157 So 429 (Fla 1934). As a result, under state law the Respondent's lien remained enforceable despite the acquisition of the right to assert the exemption.

On 13 January 1986, the Petitioner filed his Chapter 7 bankruptcy petition and claimed the above property as exempt as his homestead on his B-4 schedule, in accordance with Chapter 222.20, Florida Statutes (A113), the provision which limits Florida debtors to state, rather than federal,exemptions in bankruptcy. The bankruptcy court allowed the exemption for purposes of general administration of the estate. The exemption was allowed because exemption entitlements are determined by reference to the exemption provisions in effect on the date of the filing of the petition. 11 USC 541, In Re Zahn

605 F 2d 323 (7th Cir 1979) cert den 444 US 1075, 100 S Ct 1072, 62 L Ed 2d 757 (1980); Lewis v Manufacturer's National Bank, 364 US 603, 81 S Ct 347, 5 L Ed 2d 323 (1961).

In due course, the Petitioner received his bankruptcy discharge. Thereafter, the court permitted the case to be re-opened, at Petitioner's request, for the purpose of filing a motion to avoid Respondent's lien pursuant to 11 USC 522(f). The order of February 8, 1988 (A73), in which the bankruptcy court held the lien to be unavoidable, is the order appealed to the District Court and to the Court of Appeals. The District Court (A 62) and Court of Apeals (A 49) both affirmed the bankruptcy court.

The United States Supreme Court granted certiorari and reversed the decision of the Court of Appeals, Owen v Owen, above, holding that state defined exclusions from exemptions did not preclude

lien avoidance under 11 USC 522(f)(1). However, this Court remanded the case to the Court of Appeals for consideration in accordance with the holding in Farrey v Sanderfoot, above. (A 30).

The Owen decision, at 111 S Ct 1838, (A 29), states

> "Section 522(f) permits the avoidance of the 'fixing of a lien on an interest of the debtor'. Some court's have held it inapplicable to a lien that was already attached to property when the debtor acquired it, since in such a case there never was a 'fixing of a lien' on the debtor's interest. (cites omitted). Under Florida law, the lien may have attached simultaneously with the acquisition of the property interest. If so, it could be argued that the lien did not fix 'on an interest of the debtor'. Farrey v Sanderfoot, ___US____, 111 S Ct 1825, 114 L Ed 2d 337 (1991)."

This latter issue was left for consideration on remand.

In again affirming the District Court, the Court of Appeals stated at 961 F 2d 172 (A 4-6) that

> "...there was no fixing of a lien

> on an interest of the debtor... (and) there was never a fixing of a lien on an interest of the debtor, as the debtor had no property interest prior to the fixing of the lien."

The Court of Appeals, in relying on Farrey, apparently took the position that the Petitioner failed to meet the requirement that he own an interest in the property to which the lien attached "at some point before" the lien attached to the property. See Farrey, at 111 S Ct 1831. It was on this basis that the Court of Appeals held the lien to be unavoidable. See 961 F 2d at 172. (A 4-6).

ARGUMENT

I

In concluding that Respondent's lien was unavoidable, pursuant to 11 USC 522(f), the Court of Appeals misapplied this Court's holding in Farrey. The holding in Farrey is not as broad as the Court of Appeals has interpeted it to be.

Farrey involved the limited situation wherein ownership interests in specific real property were at risk had this Court sustained lien avoidance under 11 USC 522. Farrey involved the lien created by a divorce decree where that decree was engineered to protect a pre-existing ownership interest. The non-debtor spouse received a judicially declared lien upon the property which was transferred by that decree to secure to her the division of property ordered by the divorce court. This Court

held that the lien created by that judgment in favor of the non-debtor spouse could not be avoided.

The boundaries of the Farrey ruling are stated at 111 S Ct 1827, (A 77),

> "In this case we consider whether §522(f) of the Bankruptcy Code allows a debtor to avoid the fixing of a lien on a homestead, where the lien is granted to the debtor's former spouse under a divorce decree that extinguishes all previous interests the parties had in the property, and in no event secures more than the value of the non-debtor spouse's former interest. We hold that it does not."(emphasis added).[1]

This Court's concern for Farrey's pre-existing ownership interest is again noted at

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1. Two conditions are noted here, i.e. (1) a decree which extinguishes a pre-existing ownership interest and (2) a lien which secures no more than the value of the non-debtor spouse's former interest. Thus, in the non-debtor spouse, a ownership-to-lienholder continuum exists.

Since the Respondent here, Mrs Owen, never had an ownership interest in the property which became the subject of her lien when Petitioner acquired the property, she does not fall within the protection of Farrey. She can fulfill neither of the above (2) conditions. Further, her lien did not arise by way of any divorce decree.

> "Farrey obtained the lien not to defeat Sanderfoot's pre-existing interest in the homestead but to protect her own pre-existing interest in the homestead that was fully equal to that of her spouse. The divorce court awarded the lien to secure an obligation the court imposed on the homestead in exchange for the court's simultaneous award of the wife's homestead interest to the husband."(emphasis added).

Viewed in its entirety, the transfer under the Farrey divorce decree is more akin to a partition judgment or a purchase money mortgage than to the more commonplace lien of an unrelated judgment such as the lien held by the Respondent in Owen. Mrs Owen's lien arose by operation of law and attached to property indiscriminately. See §55.10, Florida Statutes. Respondent Owen never held a pre-existing ownership interest in Petitioner's property. Mrs Owen's lien, unlike Farrey's, never provided her with a specific interest in Petitioner's property. Farrey's lien was specifically

created by the terms of the decree. Mrs Owen's lien was not of that character, origin or magnitude.[2] It should not be accorded the same magnitude of protection that was accorded Farrey's.

Also, as the Court noted at 111 S Ct 1828, (A 82), the Farrey decision evolved from a series of dissolution of marriage

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2. No interest in specific property is created by virtue of the attachment of a judgment as a lien. In Conard v The Atlantic Insurance Company of New York, Inc., 26 US(1 pet) 386, 442-443 (1828), the Supreme Court, in construing Pennsylvania lien law, stated

> "...it is not understood that a general lien by judgment on land, constitutes, per se, a property or right in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests, subsequent to the judgment...But subject to this the debtor has full power to sell or otherwise dispose of the land. His title to it is not devested or transferred by the judgment to the judgment creditor...In short, a judgment creditor has not jus in re, but a mere power to make his general lien effectual by following up the steps of the law, and consummating his judgment by an execution and levy on the land."

Florida has adopted the rule set forth above. In Massey v Pineapple Orange Company, 87 Fla 374, 100 So 170 (Fla 1924) the court states

> "A general lien by judgment on land only confers a right to levy on the same...A

cases which present equities not to be found in Owen. It appears, in Farrey and in other similar cases noted, that an underlying factor was the desire of the courts to protect pre-existing interests (in Farrey, an ownership interest) of a non-debtor spouse.[3] Mrs Owen was never at such a risk

2. (cont.)judgment creditor has no jus in re, but a mere power to make his general lien effectual by following up the steps of the law and consummating his judgment by an execution and levy upon the land."

See also Gilpen v Bower, 12 So 2d 884 (Fla 1943), wherein the Court distinguishes mortgages and judgment liens and concludes that a judgment lien was not a claim upon specific property. See also Nassau Realty Company Inc. v City of Jacksonville, et al., 198 So 581 (Fla 1940)(distinguishing judgment liens and liens on specific property); Young v McKenzie, 46 So 2d 184 (Fla 1950)(following Massey, above); Smith v Pattishall, 127 Fla 474, 176 So 568 (Fla 1937)(same).

3. Note at 111 S Ct 1828 (A 85)

"The sole question presented in this case is whether §522(f)(1) permits Sanderfoot to avoid the fixing of Farrey's lien on the property interest that he obtained in the divorce decree."

Without the relief provided by this Court, Farrey would have parted with her ownership interest in return for the security of the lien given by the divorce decree, only to have the security of the lien stripped from her when the former spouse, who acquired her prior interest in the property, later sought bankruptcy relief. Without relief in this Court she would have suffered a two-fold deprivation which, in the end, would have taken from her the entirety of the property she once owned.

because her lien was never a substitute for a prior ownership interest in any property.

In restating its desire to protect Farrey's pre-existing ownership interest, and the lien given to secure that interest, the Court notes at 111 S Ct 1831, (A 97),

> "...to permit a debtor in these circumstances to use the code to deprive a spouse of this protection would neither follow the language of the statute nor serve the main goal it was designed to address." (emphasis added)

The Petitioner concedes that a lien arising under the circumstances of Farrey would not likely have been the evil which Congress sought to remedy when §522(f) was enacted.[4] However, those peculiar circumstances are not present in Owen. Avoiding Mrs Owen's lien would not deprive her of something she once owned, it would merely deprive her of

4. The Court, in Farrey, assumed, but did not determine, that the lien involved in that case was a judicial lien. See 111 S Ct 1828, (A 85). However, in Owen, the Court specifically stated that, "The lien in the present case is a judicial lien..." (A 19).

an opportunity to acquire something she never previously had. Her interests were never equivalent to those of Farrey and such interests as Mrs Owen had are not worthy of the protection of the Farrey rule as interpreted by the Court of Appeals in its recent decision.

II

The issue which this Court directed the Court of Appeals to consider on remand is stated at 111 S Ct 1838, (A 29), as follows

> "Under Florida law, the lien may have attached simultaneously with the acquisition of the property interest. If so, it could be argued that the lien did not fix 'on an interest of the debtor'. See Farrey v Sanderfoot, ___US ____, 111 S Ct 1825, ___ L Ed 2d ____ (1991)."

The actual language of the holding in Far-

rey, at 111 S Ct 1829, (A 87),

> "...unless the debtor had the property interest to which the lien attached at some point before the lien attached to that interest, he or she can not avoid the fixing of the lien under the terms of 11 USC 522(f)(1)." (emphasis added)

Quite obviously, this Court did not conclude in its Owen opinion that the above rule required that lien avoidance be denied to Petitioner Owen.[5] However, the Court of Appeals, at 961 F 2d 172, held (A 4-6)

> "...there was no fixing of a lien on an interest of the debtor... (and) there was never a fixing of a lien on an interest of the debtor, as the debtor had no property interest prior to the fixing of the lien."

This holding can not be sustained, so as deny Petitioner the avoidance of the lien, under the facts of this case.

Florida law clearly provides that a judgment can be no lien upon any property

5. Note at 111 S Ct 1838, (A 29), wherein the Court states with reference to the issues remanded that

> "It could be argued that the lien did not fix 'on an interest of the debtor'. (cite) ... We express no opinion on these points..."

unless and until property is owned by the judgment debtor.[6] A judgment attaches as a lien to the judgment debtor's property

6. The conclusion, i.e that there "...was no fixing of a lien on an interest of the debtor..." could only be true in a situation like that presented in In Re McCormick, 18 BR 911 (Bankr WD Pa 1982) aff'd 22 BR 997 (DC WD Pa 1982), noted by this Court in Owen, 111 S Ct 1838. In McCormick, the lien attached to a joint interest prior to the time that the debtor acquired sole interest in the property. Because the lien attached prior to acquisition of his sole interest, the debtor did acquire the property with the lien already attached. Under those facts, it can be observed that there was no fixing of a lien on an interest of the debtor because the lien became fixed while owned by the prior titleholders, i.e. the joint judgment had attached during the prior joint ownership and therefor the lien was already attached to the property when it became solely owned by the debtor.

This is plainly not what occurred in Owen, because Mrs Owen's judgment was against Owen himself and not against Owen's predecessor in title. For Mrs Owen to have had a lien on the property prior to Owen's acquisition of his interest, Mrs Owen's judgment would have had to have derived from Owen's predecessor in title, rather than through Owen himself.

The opinion of the Court of Appeals reads as though McCormick applies. Quite clearly, it does not. See In Re Sprick, 78 BR 292 (Bankr D Kan 1987) for an analysis of McCormick and an explanation of when it does not apply.

and to none other.[7] In Owen, there was no lien in favor of the creditor until Petitioner acquired title in November 1984. The judgment attached as a lien upon the Petitioner's interest in the property because, by definition, it could not attach to anything else.

Because the lien was "dependent" upon Petitioner's ownership, it is clear that "ownership" was the condition "precedent" to the very existence of the lien. Farrey, at 111 S Ct 1829, (A 87), requires that the debtor have the property interest to which the lien attached "at some point before" the lien attached to the interest.

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7. See Cheves et al. v First National Bank of Gainesville, 79 Fla 34, 83 So 870 (Fla 1920)(a judgment is no lien upon land before acquisition of title); First National Bank of Chipley v Peel, 107 Fla 413, 145 So 177 (Fla 1933)(judgment lien could not attach to property until it was owned by the judgment debtor); Baron v Aiello, 319 So 2d 198 (Fla 3d DCA 1975); Bowers v Mozingo, 399 So 2d 492 (Fla 3d DCA 1981); Accent Realty of Jacksonville, Inc., v Crudele, 496 So 2d 158 (Fla 3d DCA 1986) (creditor may not acquire judgment lien on property to which judgment debtor does not hold legal title).

The phrase "at some point before" is not further defined in Farrey. The Court of Appeals, in Owen, concluded that there was no fixing of a lien on an interest of the Petitioner because the Petitioner had no property interest "at some point before" the lien attached. See 961 F 2d 172, (A 4-6). However, this conclusion is not sound because the creditor had no lien until acquisition of the property by the Petitioner. Thus, a sequence of events exists in which "ownership" must first occur.[8] Pimbe's case[9] provides an illustration of how the "at some point before" rule should apply in Owen. Pimbe's case involved the operation of the Statute of Uses. In that case, land was transferred to one Throckmorton for the use of his transferor. Throckmorton was then convic-

8. The reverse could never be true. A lien is entirely dependent upon the existence of ownership for its existence. See note #7 and cases cited.
9. 72 Eng Rep 528 (1585). See Scott & Scott, Selected Cases and Other Authorities on the Law of Trusts 286 (5th Ed. 1966).

ted of treason which had been committed prior to the transfer. As a result, the land was forfeited to the crown at the moment of its transfer to Throckmorton. The use could not be enforced against the crown and was therefore not executed by the Statute. Because Throckmorton was seised of the land, for an "instant", at the time of his treason, the forfeiture occurred.[10]

Even though events appear to occur with no separation of time, i.e. acquisition of title and attachment of the lien, a sequence exists which has legal significance. It is the existence of this "sequence", rather than the quantity of time separating the components of that sequence, which is the key factor. A true sequence is operative in Owen and

10. See C. Robert Morris, Bankruptcy Fantasy: The Site of Missing Words and the Order of Illusory Events, Arkansas Law Review, Vol. 45, No. 2, (1992), p. 304, ("...the jurists found that the Statute uses a two-step sequence...Although, this was a temporal sequence, no time interval separated its parts...").

under this analysis, Owen satisfies the "before" element stated in Farrey.[11] As a result, Farrey should not operate to preclude lien avoidance under 11 USC 522(f)(1).

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11. The foregoing concept could be illustrated in a slightly different manner. In Cheves, et al. v First National Bank of Gainesville, above, a debtor, who had suffered a judgment against him, acquired ownership of property and contemporaneously gave a purchase money mortgage to the seller. The court held, in that case, that the purchase money mortgage had acquired some "priority" over the previously existing judgment.

Whether interpreted as a "temporal event" or merely as a "legal priority" otherwise contemporaneous events have been given a legal "order". Where interests are favored in the law, i.e. a purchase money mortgage vs. a judgment lien, courts have had no difficulty in finding this "order" or "priority" where competing events would appear to arise at the same time. See Schilling, et al., v Bank of Sulphur Springs, 147 So 218 (Fla 1933); Associates Discount Corporation v Gomes, 338 So 2d 552 (Fla 3d DCA 1976); Sarmiento v Stockton, Whatley, Davin & Company, 399 So 2d 1057 (Fla 3d DCA 1981).

The concept of "ownership" must prevail over the concept of the "lien" whether analyzed in terms of legal priorities or temporal events because the lien is wholly dependent upon "ownership" for its existence. That is not the case where a mortgage competes with the lien because, in that instance, neither interest is dependent upon the other. For these reasons Owen satisfies the "before" condition stated in Farrey and therefore should not be denied avoidance of the lien.

III

Assuming, without conceding, that the Farrey rule otherwise precludes the Petitioner from obtaining avoidance of the lien, the holding in Farrey should be narrowed, or otherwise qualified, because the holding is broader than was necessary to achieve the result in that case. Although the result in Farrey was reasonable given the circumstances of those parties, its holding should not control the outcome of cases, such as Owen, where the true nature of the lien, and the respective property interests of the parties, are fundamentally different.

Although liens of the type found in both Farrey and Owen fall within the code definition of "judicial lien", see 11 USC 101(36), the lien involved in Farrey was, in truth, of a special character. Although declared by judgment, the lien more closely

resembles a purchase money mortgage because it was created as "security" for the payment of the "purchase price" of a pre-existing ownership interest which was being transferred from one party to the other.[12] Security devices of this nature are not avoidable under §522(f), perhaps in part, because such security oftens protects a prior ownership interest which is being transferred. Ownership interests, such as the one in Farrey, are vastly different, and more worthy of protection, than interests acquired by the random operation of judgment lien statutes such as the one involved in Owen.

It is submitted that Respondent's lien and the manner of its creation, is more

12. This Court observed this feature in Farrey. At 111 S Ct 1827, (A77-8), the opinion states

> "...where the lien is granted to the debtor's former spouse under a divorce decree that extinguishes all previous interests the parties had in the property, and in no event secures more than the value of the non-debtor spouse's former interest..." (emphasis added).

typical of the liens which arise in the ordinary course of debtor/creditor relations. For this reason, it appears far more probable that Congress intended to provide relief from the Owen-type lien, rather than the Farrey-type lien, when it fashioned §522(f).

To permit a rule derived for the protection of ownership interests transferred in divorce cases to be applied to the broader category of general judgment liens would, to some degree, defeat the purpose of §522(f). Further, such a rule would grant a dignity or immunity to non-specific liens of general creditors which such liens never previously achieved.[13] This is

13. Farrey parted with her entire ownership interest in exchange for her lien, whereas Mrs Owen did not. Though Farrey's interest was fundamentally superior to Mrs Owen's, each interest would receive identical immunity from §522(f) under the holding of the Court of Appeals in Owen. 961 F 2d 172 (A 4-6). As a , result, the Farrey rule, as applied by the Court of Appeals, reaches beyond its purpose to the point of restricting operation of §522(f) to a greater extent than the code language suggests. No language in §522 supports denial of lien avoidance in Owen. See In Re Latulippe, 13 BR 528 (Bankr D Vt 1981)(noting that §522 contained no "time of attachment" limitation).

not warranted in Owen because there is nothing in the circumstances of the Owen lien which would entitle it to the "specialized" treatment accorded to the Farrey lien.

There are sufficient material distinctions between the Farrey-type lien and the Owen-type lien which would permit a principled narrowing of the Farrey rule. Farrey should be applied to divorce situations or other similar situations where a lien is created for the protection of an ownership interest. The Farrey rule should not be applied to protect general or random lien acquisitions which are common to the ordinary debtor/creditor relation. The Farrey and Owen liens differ in every material respect and they should receive differing treatment under §522 for that reason.

This Court should focus on the interests protected by those liens rather than the "time of attachment" of those liens.

REASONS FOR GRANTING THE WRIT

This Court previously granted certiorari in both Owen and Farrey because of the significance of the lien avoidance provision of the Code. Farrey produced a limitation on the scope of §522(f). The Court of Appeals, in Owen, on remand, further limited the reach of that section by applying Farrey to a dissimilar set of conditions and equities. The Court of Appeals concluded that the Petitioner was disqualified from lien avoidance because he did not own the property "at some point before" the lien attached to the property. This conclusion can not be sustained.

A literal, if technical, application of the phrase "at some point before" would support, rather than deny, lien avoidance to Petitioner for all of the reasons stated in Part II, above. Petitioner asserts that

such an application of the Farrey rule would avoid further limitation or restriction of §522(f). The appropriate focus should be upon the nature of the interests protected by the lien rather than upon the "time of attachment" of that lien.[14]

The Court of Appeals has, in Owen, taken the Farrey rule, a rule generated under special circumstances, and applied that rule to a case where all material features are distinguishable. This has produced a questionable limitation upon the operation or application of §522(f) and it is a limitation or condition which Congress did not impose by the language of that section.[15]

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14. See United States v Donovan, 429 US 413, 97 S Ct 658, 50 L Ed 2d 652 (1977) wherein this Court deemed it proper to grant certiorari where the proper construction to be placed upon a major federal statute was at issue.

15. See Williams v Lee, 358 US 217, 79 S Ct 269, 3 L Ed 2d 251 (1959) wherein this Court granted certiorari where it perceived that the lower court had rendered a doubtful interpretation on an important question. See Note #13, In Re Latulippe, above.

The issue now presented by this petition was left undecided by this Court in its prior opinion. See 111 S Ct 1838, (A 29) where the following appears

> "Under Florida law, the lien may have attached simultaneously with the acqusition of the property interest. If so, it could be argued that the lien did not fix 'on an interest of the debtor' (citing Farrey)....We express no opinion on these points..." [16]

Thus, this Court left open the very issue about which review is now sought, i.e. the proper application of Farrey to the category of liens typified by Owen. This Court has deemed it appropriate to grant certiorari in order to resolve questions left

16. It is reasonable to argue that this Court did not envision Farrey being applied so as to defeat lien avoidance in Owen. The facts in Owen were fully before the Court and the Court had the benefit of the district court opinion wherein the 'fixing' issue was addressed. See 86 BR 691. Furthermore, nothing would have prevented this Court from rendering a 'dual' holding in Owen. This Court did precisely that in Arizona v Fulminante, ___US___, 111 S Ct 1246, 113 L Ed 2d 302 (1991), wherein there appears a holding in an opinion by Justice White and a distinct holding in an opinion by the Chief Justice.

open by prior Supreme Court decision.[17] For the reasons stated in Parts I and III, above, this Court should examine the application of the Farrey rule to non-Farrey type liens.[18]

For all of the foregoing reasons, a clarification or limitation of Farrey is in order. The material features of the liens involved in Farrey and Owen differ markedly from one another. The manner of the creation of the respective lien, its true nature and the magnitude of the interest the lien secures or protects differ in each case. The two liens, consequently, should not receive the same treatment or protection, insofar as §522(f) is applied.

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17. See United States v Martinez-Fuerta, et al., 429 US 543, 96 S Ct 3074, 49 L Ed 2d 1116 (1976); American Textile Manufacturers Inc., et al., v Donovan, 452 US 490, 101 S Ct 2478, 69 L Ed 2d 185 (1981); Parratt v Taylor, 451 US 527, 101 S Ct 1908, 69 L Ed 2d 420 (1981).

18. As noted in footnote #4, above, this Court did not specifically determine the Farrey lien to be a "judicial lien". Some distinction must be made between the liens involved in these cases insofar as §522 is concerned.

In the absence of clarification or limitation of the rule stated in Farrey, the two categories of liens represented in Farrey and Owen are likely to receive equivalent treatment by the lower courts. The distinction between the two categories of liens is too great to permit such a result to exist or continue. Certiorari is appropriate where there exists a need for clarification of a prior Supreme Court opinion.[19]

Valid and significant reasons for the granting of the writ are present here.

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19. See Securities and Exchange Commission v United Benefit Life Insurance Company, 387 US 202, 87 S Ct 1557, 18 L Ed 2d 673 (1967); McDaniel, et al., v Sanchez, 452 US 130, 101 S Ct 2224, 68 L Ed 2d 624 (1981)(certiorari granted because of importance of question presented and because prior opinion not free from ambiguity); Wilkinson v United States, 365 US 399, 81 S Ct 567, 5 L Ed 2d 633 (1961)(writ granted where it was argued that Court of Appeals had misconceived meaning of prior Supreme Court opinion); Schlude v Commissioner of Internal Revenue, 372 US 128, 83 S Ct 601, 9 L Ed 2d 633 (1963)(certiorari granted a second time to consider whether lower court misapprehended the scope of prior Supreme Court opinion); Arkansas v Sanders, 442 US 753, 99 S Ct 2586, 61 L Ed 2d 235 (1979)(certiorari granted to resolve apparent misunderstanding); United States v Doe, 465 US 605, 104 S Ct 1237, 79 L Ed 2d 552 (1984).

CONCLUSION

Certiorari should be granted and the decision of the United States Court of Appeals for the Eleventh Circuit should be reversed.

In the alternative, the Petitioner requests the Court to grant summary reversal in this cause.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was furnished by US Mail to David A. Townsend, 200 E. Madison Street, Tampa, Florida 33602 and to John R. Shuman, 2555 Enterprise Rd., Clearwater, Florida 34623, Attorneys for Respondent, this ___ day of October 1992.

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